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No. 06-344

FILED
DEC 06 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MINERAL COUNTY, TOWN OF SUPERIOR, ST. REGIS SCHOOL DISTRICT, SUPERIOR SCHOOL DISTRICT NO. 3, MONTANA COALITION OF FOREST COUNTIES, and TRICON TIMBER LLC,

Petitioners,

v.

ECOLOGY CENTER, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner's Corporate Disclosure Statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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Whether viewed as imposing procedural and substantive requirements upon the Forest Service not found in the National Environmental Policy Act or National Forest Management Act as petitioners argue, or as a failure to apply the proper standard of review under the Administrative Procedure Act as federal respondents argue, or as improperly imposing upon the Forest Service the burden of proof to justify its land management actions as amici argue – all of which amount essentially to the same thing – the decision of the Ninth Circuit Court of Appeals misinterpreted the law in a way that straitjackets federal agency decisionmakers in managing western national forests to improve forest health and reduce the risk of loss from catastrophic wildfire and insects. From petitioners' perspective, then, the issue is not whether the court of appeals misinterpreted and misapplied the law; rather, the issue is whether this case presents a proper vehicle for the Court to exercise its supervisory powers by instructing the Ninth Circuit on the limits of judicial interference in agency land management decisionmaking. Because respondent Ecology Center has offered neither a persuasive reason for this Court to deny Mineral County's petition nor an effective rebuttal to the compelling reasons offered in support of review, which reasons are summarized below, the Court should grant petitioners' request and issue a writ of certiorari.

First, the Ninth Circuit has decided an important federal question about the degree of deference owed to Forest Service land management decisions in the face of scientific uncertainty in a way that conflicts with relevant decisions of this Court. Scientific certainty is not a prerequisite for making decisions under the National Environmental Policy Act ("NEPA"), the National Forest Management Act ("NFMA") or the Administrative Procedure Act ("APA"), nor is it a standard by which NEPA and NFMA decisions should be judged. This Court held in *Baltimore Gas & Elect. Co. v. NRDC, Inc.*, 462 U.S. 87 (1983), that a reviewing court should "be at its most deferential when the agency is making predictions, within its area of special

expertise, at the frontiers of science." *Id.* at 103. An agency's exercise of discretion in matters involving a high level of technical expertise is entitled to substantial deference. *Marsh v. Oregon Natural Resource Council*, 490 U.S. 360, 377 (1989). This Court has not held, as the Ninth Circuit did in this case, that before a land management agency can act, it must verify its management practices with on-the-ground research. Even if one were to accept the Ninth Circuit's premise that the land management practice of thinning smaller trees to reduce the risk of forest losses from wildfire and insects and to help maintain and improve old growth and old growth-dependent wildlife is an "unverified hypothesis," it does not follow that the level of deference due the land management agency would diminish or that the burden of proof would shift to the agency.[1] More fundamentally, the Ninth Circuit's decision ignores the fact that the field of natural resources management is not premised on immutable truths.[2] Indeed, management of public

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1. The Forest Service in fact had direct observational evidence that the proposed stand treatments would have preserved habitat for old growth-dependent species. App. 33a. In contrast, Ecology Center lacked "proof that the proposed treatment causes the harm it fears." App. 7a.

2. Despite a multitude of unresolved scientific issues in the realm of natural resources management, land management activities do not cease pending resolution of all outstanding questions. *See, e.g.*, Clinton T. Moore et al., *Forest Management Under Uncertainty for Multiple Bird Population Objectives, in* USDA Forest Service Gen. Tech. Rep. PSW-GTR-191 373-80 (2005), *available at* http://www.fs.fed.us/psw/publications/documents/psw_gtr191/Asilomar/pdfs/373-380.pdf; James D. Nichols et al., *Managing North American Waterfowl in the Face of Uncertainty*, 26 Annu. Rev. Ecol. Syst. 177-99 (1995), *available at* http://www.fws.gov/migratorybirds/reports/ahm02/nichols-johnson-williams-1995.pdf; Jonathan Thompson, *Acting on Uncertainty in Landscape Management-Options Forestry*, 78 Science Findings Pacific Northwest Research Station 1, 5 (2005) ("'In the end, we hope that forest management can be viewed as a never-ending set of questions rather than a series of disconnected truths.'"), *available at http://www.fs.fed.us/*

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lands would grind to a halt if all forest management hypotheses had to be verified prior to implementation. Forest science is constantly evolving, and federal land managers must be able to make decisions based upon the available information. Thus, as the dissent noted, the opinion represents an "unprecedented incursion into the administrative process" that "ratchets up the scrutiny we apply to the scientific and administrative judgments of the Forest Service" and replaces the arbitrary and capricious standard of review with a "more demanding [verified scientific evidence] standard." App. 27a (McKeown, J., dissenting). Although such an exacting standard may have a statutory (and commonsense) basis in the context of approving drugs meant for human consumption, *see* App. 9a, that standard never before has governed federal forest management decisions, particularly those made in the face of scientific uncertainty and where, as here, significant environmental risks are associated with non-action. App. 35a ("Old-growth areas 'are now at risk for major disturbances such as disease and insect epidemics and high-severity stand replacing fires.' Inaction or delay threatens the species Ecology Center seeks to protect.") (McKeown, J., dissenting). *See also* Stephen Breyer, *Vermont Yankee and the Court's Role in the Nuclear Energy Controversy*, 91 Harv. L. Rev. 1833 (1978) (discussing uncertainty in agency decisionmaking, and the proper scope of judicial review in light of such uncertainty, in the context of proposed nuclear power plants that would generate hazardous waste requiring new and uncertain long-term storage technologies while at the same time generating health and safety benefits). Moreover, as amici point out, the Ninth Circuit's on-the-ground, verified scientific evidence standard conflicts with the deferential standard of

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pnw/sciencef/scifi78.pdf; Scientific Personnel & Current Studies, Rocky Mtn. Research Station., RWU-RM-4251 1, 5 (2006) ("Research Problem #1: Understand ecological tradeoffs of vegetation management options for managing wildfires and reducing risks on wildlife."), *available at* http://www.rmrs.nau.edu/lab/4251/FY06_book.pdf.

review applied in other circuit courts of appeal. Brief Amicus Curiae ("Amici Br.") at 15-18. For example, the D.C. Circuit Court of Appeals has emphasized that "'[A]n agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to *particularly deferential* review' . . . and need not rest on 'pure factual determinations.'" *EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006) (citations omitted).

Second, aside from the more general federal question of deference to agency land management decisions in the face of scientific uncertainty, this case raises the important question of whether the Forest Service can proceed promptly with hazardous fuel reduction projects on national forests to reduce the risk of catastrophic wildfire. Catastrophic wildfire is a costly national problem, both from a monetary and a non-monetary resource perspective. Petition for Writ of Certiorari at 9 n.1. Since 2002, the estimated annual federal expenditures on fighting wildfires has averaged more than one billion dollars.[3] *Wildland Fire Statistics, available at http://www.nifc.gov/stats/suppression_costs.html* (last visited Dec. 4, 2006). The Ninth Circuit's opinion significantly constrains the Forest Service's ability to reduce unprecedented fuel loads in forests throughout the western states. *See, e.g., Healthy Forests-An Initiative for Wildfire Prevention and Stronger Communities* (2002) (explaining that "[a]bout 190 million acres of federal forests and rangelands in the lower 48 states face high risk of catastrophic fire due to deteriorating

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3. The amount of forest and rangeland destroyed by wildfires is at an all time high. *Climate of 2006 Wildfire Season Survey*, National Climatic Data Center ("The preliminary number of acres burned so far this year in the U.S. is a record for an entire year."), *available at* http://www.ncdc.noaa.gov/oa/climate/research/2006/fire06.html (last visited Dec. 4, 2006). Wildfires also are becoming a major emission source of carbon dioxide. *See, e.g.*, http://www.ucar.edu/communications/newsreleases/2004/acme.shtml (amount of carbon dioxide released from forests burned in Colorado during 2002 "equaled an entire year's emissions from statewide transportation activities") (last visited Dec. 4, 2006).

ecosystem health and drought. For instance, many ponderosa pine forests are 15 times more dense than they were a century ago. Where 25 to 35 trees once grew on each acre of forest, now more than 500 trees are crowded together in unhealthy conditions"), *available at* http://www.whitehouse.gov/infocus/healthyforests/Healthy_Forests_v2.pdf. Although the heavy fuel loads are a problem throughout the west, fuel loading is of particular concern to petitioner Montana Coalition of Forest Counties, whose constituent counties are dominated by federal forestlands on which officials are powerless to take action for the protection of county residents.

Third, the Ninth Circuit's decision is contrary to this Court's admonition that it is not for courts to impose on federal agencies additional procedural requirements not found in NEPA. Respondent Ecology Center asserts that the Ninth Circuit's decision is nothing more than an unremarkable, garden variety NEPA opinion because, according to respondent, NEPA itself forbids the "preparation of a document based on an unverified, unresearched hypothesis." Respondent's Brief in Opposition ("Resp't Br.") at 6. Mineral County agrees that the Ninth Circuit opinion stands for the proposition that an environmental impact statement "based on an unverified . . . hypothesis" is invalid; however, Mineral County strongly disagrees that this is a correct statement of NEPA law. *See, e.g., Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 548 (1978) ("[T]he only procedural requirements imposed by NEPA are those stated in the plain language of the Act.") (citing *Kleppe v. Sierra Club*, 420 U.S. 390, 405-06 (1976)); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353-59 (1989) (rejecting Ninth Circuit's effort to impose additional requirements on agency beyond those found in NEPA). The Ninth Circuit ignored this Court's teachings by requiring the Forest Service to field verify soil conditions on all harvest units before completing its environmental impact statement, and it did so even though each harvest unit would have been ground truthed as part of the

project's mitigation prior to harvest being permitted. App. 22a-25a. The Ninth Circuit also imposed a procedural requirement found neither in NEPA nor NFMA by requiring as a prerequisite to treatment conclusive research on the effects of treating old growth habitat via the removal of smaller trees to reduce wildfire danger.[4]

Fourth, the Court should correct the Ninth Circuit's erroneous interpretation of NFMA, which engrafted a wildlife viability "mandate" into the statute's diversity provision contrary to the law's plain language. See 16 U.S.C. § 1604(g)(3)(B). This is an important question of federal law that should be settled by this Court. By finding a viability mandate in the murky text of NFMA's diversity provision, the Ninth Circuit has constrained the Forest Service's discretion to manage national forests to achieve other proper objectives, such as reducing the risk of insect epidemics and catastrophic wildfire per Congress' explicit instruction in NFMA and the Healthy Forests Restoration Act of 2003 ("HFRA"). *See, e.g.*, 16 U.S.C. § 1604(m)(1) (stating that NFMA "shall not preclude the Secretary from salvage or sanitation harvesting of timber stands which are substantially

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4. Although respondent Ecology Center argues that a writ of certiorari is not warranted because the NEPA implementing regulations already address how agency analysis should proceed in the face of scientific uncertainty, Resp't. Br. at 7 (citing 40 C.F.R. § 1502.22(a)), the fact is that the Forest Service's environmental impact statement addressed uncertainty and specifically analyzed the effects of treatment on the goshawk and pileated woodpecker, the two old growth-related species at issue in the case. SER 240-247. Indeed, as part of the analysis, the EIS contained alternatives that included no harvest in old growth stands. *Id.* For those alternatives that allowed the harvest of old growth habitat, treatment was minimal, leaving the Forest Service to conclude that there would be only a minor impact. See SER 242 ("This alternative would treat approximately 67 acres of vegetation in potential goshawk habitat in seven stands. Because the vegetation treatments would be designed to promote old growth with an open understory and because the treatment would involve only about 2% of potential habitat, this alternative would have no impact on goshawk habitat").

damaged by fire, windthrow or other catastrophe, or which are in imminent danger from insect or disease attack"); 16 U.S.C. § 6501 (stating that HFRA's purposes include such things as reducing wildfire risks on federal lands and increasing carbon sequestration).

Respondent Ecology Center argues that the Ninth Circuit correctly held that NFMA required the underlying project to contain measures to maintain wildlife viability because the Lolo Forest Plan requires that animals be managed to maintain population viability, and NFMA requires that projects be consistent with the Forest Plan. Resp't Br. at 16 (citing 16 U.S.C. § 1604(i)). Respondent concludes that because the "decision construes regulations that apply to a small set of the Service's actions, the practical application of a decision in this case is necessarily limited to plans and projects governed by the now repealed regulations." *Id.* at 17. However, the Ninth Circuit's opinion does not interpret the governing Forest Plan or the NFMA regulations but instead explicitly cites to NFMA's diversity provision, 16 U.S.C. § 1604(g)(3)(B), as the source from which the supposed viability mandate springs. Nowhere does the opinion reference the regulation, 36 C.F.R. § 219.27, or the Forest Plan as the basis for the viability mandate.[5]

Resolving the meaning of the diversity statutory language is not a mere academic exercise over an inconsequential legal

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5. Respondent Ecology Center cites to *Indiana Forest Alliance, Inc. v. U.S. Forest Serv.*, 325 F.3d 851, 861-62 (7th Cir. 2003), for the proposition that the Seventh Circuit has found a viability mandate in NFMA. Resp't Br. at 17-18. However, the Seventh Circuit's discussion of wildlife viability was based on the NFMA regulations, not the diversity provision of 16 U.S.C. § 1604(g)(3)(B). In fact, the Court in *Indiana Forest Alliance* upheld a Forest Service decision after deferring to the opinions of Forest Service experts, noting that "scientific dispute is part of the every day existence for agencies involved in environmental projects." *Id.* at 861. Unlike the Ninth Circuit, the Seventh Circuit simply does not read the statutory diversity provision of NFMA as establishing a wildlife viability mandate. See *Sierra Club v. Marita*, 46 F.3d 606, 620 (7th Cir. 1995).

issue. Although the wildlife viability regulation has been superseded, see 70 Fed. Reg. 1023 (Jan. 5, 2005), 36 C.F.R. § 219.14(f) (2005), the new regulatory structure is being challenged in *Citizens for Better Forestry v. U.S. Dept. of Agric.*, Civ. No. C 05-1144 PJH (N.D. Cal. filed March 21, 2005) (complaint available on PACER from Northern District of California website). More fundamentally, the Ninth Circuit found the viability mandate in NFMA *per se*, which ultimately governs Forest Service actions independent of any change to the regulations.

Finally, federal respondents state that it remains to be seen whether the Ninth Circuit's decision to impose heightened scrutiny of agency decisions under NEPA and NFMA is an aberration. Brief for Federal Respondents at 17. Respectfully, Mineral County disagrees. *See, e.g., Idaho Sporting v. Rittenhouse*, 305 F.3d 957, 975-76 (9th Cir. 2002) (Thompson, J., dissenting) (objecting to majority's demand for detailed wildlife viability analysis where a timber sale would not have depleted wildlife habitat); *Lands Council v. Powell*, 395 F.3d 1019, 1028 (9th Cir. 2005) (requiring detailed analysis of all past actions in a watershed over several decades, including the "time, type, place, and scale of past timber harvests," to satisfy NEPA, rather than focusing on the relevant environmental manifestations of past harvests). *See also* Amici Br. at 8 n.9. As the amici explain, the Ninth Circuit reverses district court interpretations of NEPA and NFMA more than any other circuit court. Amici Br. at 7-9. Moreover, the Ninth Circuit's decision comes at a time of urgent need to reduce heavy fuel loads in overstocked western federal forests so as to maintain those forests for the benefit of human and non-human species alike. The opinion thus represents a watershed mark in the Ninth Circuit's ongoing quest to impose expansive data and analytical burdens on federal land management agencies. This Court should turn back the tide.

CONCLUSION

For the foregoing reasons, Mineral County respectfully urges the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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